United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2150

To be argued by
HENRY J. BOITEL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2150

WALTER GRANT,

Petitioner-Appellant,

vs.

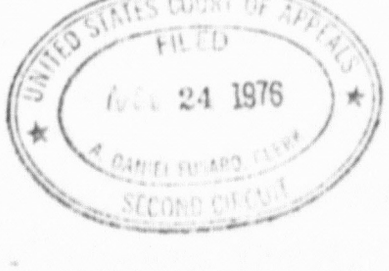
UNITED STATES OF AMERICA,

Respondent.

On Appeal From The United States District Court
For The Southern District Of New York

B
B/s

BRIEF AND APPENDIX IN BEHALF OF
APPELLANT WALTER GRANT



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Questions Presented for Review

1. In this proceeding, pursuant to 28 U.S.C. § 2255, was it established that the petitioner Grant had not knowingly and intelligently waived his Sixth Amendment right to the effective assistance of counsel?

2. Do the facts established at the hearing show that Grant was, in fact, deprived of the effective assistance of counsel by virtue of the same law firm representing five other defendants at the trial?

3. In any event, does the evidence show that, in advance of trial, Grant was improperly misled into believing that his right to contest illegal wiretap evidence had been preserved and protected?

4. Did the District Court err in dispensing with Grant's presence at an evidentiary hearing, thus denying Grant's opportunity to testify in his own behalf and his right to cross-examine those who gave evidence in opposition to the merits of his petition?

UNITED STATES COURT OF APPEALS

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BRIEF AND APPENDIX IN BEHALF OF APPELLANT WALTER GRANT

Preliminary Statement

Walter Grant appeals from an Order of the United States District Court for the Southern District of New York (Bonsal, J.), which denied his motion under 28 U.S.C. § 2255 for the vacation of a sentence previously imposed upon him. The Order in question was entered on September 13, 1976 (J.A. 87)*. The sentence sought to be reviewed,

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*Willie Abraham, appellant in No. 76-2135, has filed a
[footnote continued on following page]

was the result of a judgment of conviction entered against Grant after a jury trial in the Southern District of New York. He was found guilty of a conspiracy and a substantive offense in violation of Federal narcotics laws (21 U.S.C. §§ 846, 843[b]). He was sentenced to serve a term of imprisonment of fifteen years on the conspiracy count, and four years on the substantive count, to run consecutively, and he was placed on special parole for a period of five years to commence upon release from confinement. He is presently incarcerated pursuant to that sentence, which was entered on June 26, 1973.

Statement of Facts*

A. Introduction.

As will hereinafter be shown, six co-defendants

[footnote continued from prior page]

document entitled "Joint Appendix". References to that Joint Appendix are preceded by "J.A.". There have also been filed with this Court four copies of a pre-trial conflict of interest hearing which occurred on November 22, 1972. References to the pages of that transcript are preceded by "Nov."; there have also been filed with this Court four copies of the evidentiary hearing which occurred with respect to the instant application for collateral relief. References to that transcript are preceded by "H.".

Since the aforesaid Joint Appendix does not include the docket entries, petition, etc., relating to the appellant Grant, we have annexed those documents to this brief. References to those materials are preceded by "A.".

*We have noted that Willie Abraham, the appellant in No. 76-2135, has filed a brief containing a lengthy statement of facts. In order to avoid an unnecessary burden upon this Court, we shall attempt to limit the instant statement.

in a substantial narcotics conspiracy case were represented by the New York law firm of Lenefsky, Gallina, Mass, Berne & Hoffman. Prior to trial, upon motion of the government (J.A. 47-50), a proceeding was conducted in the District Court on November 22, 1972, for the purpose of determining whether a conflict of interest existed by virtue of the law firm's representation of the six defendants (Nov. 1-3). The defendants in question, all of whom were present at the proceeding, were: Alphonse Sisca, Willie Abraham, Walter Grant, Robert Hoke, Erroll Holder and Margaret Logen. (Nov. 2). The firm appeared by Gino Gallina, Esq., who undertook to represent all of the defendants with respect to the proceeding (Nov. 1, et seq.).

Following various statements by the prosecutor, Mr. Gallina, and the District Court, with respect to the issue of conflict of interest, each of the defendants "elected" to remain represented by the law firm, and the Court permitted the firm's representation of multiple defendants to continue (Nov. 43).

As discussed in this Court's opinion, which affirmed th e subsequent convictions, United States v. Sisca, 503 F. 2d 1337 (2d Cir., 1974), cert den., 419 U.S. 1008 (1974), substantial wiretap evidence was introduced at trial. Such evidence included the conversations of Grant (503 F. 2d at 1341). It appears that thousands of telephone conversations were intercepted by virtue of wiretaps operated by a Federal-State Joint Task Force, pursuant to

orders issued by New York State Courts. Each of the wiretaps was conducted with the use of automatic recording equipment, and no effort was made to minimize the interception of non-pertinent or privileged conversations. The operations of the wiretap were, therefore, squarely violative of the provisions of 18 U.S.C. § 2518(5). Unfortunately, the law firm did not file a pre-trial motion to suppress the investigative products of the wiretaps, upon that ground. Following the trial, the District Court, after a hearing, found that the "minimization requirements were not satisfactorily observed." United States v. Sisca, 361 F.Supp. 735, 745 (S.D.N.Y., 1973). However, the District Court further found that the remedy for such a violation, did not include the suppression of "pertinent" conversations (United States v. Sisca, at 745-748). In any event, the Court found that the failure to file a pre-trial motion to suppress, constituted a waiver of the defendants' rights to suppression (361 F.Supp. at 739-741). This Court affirmed the latter conclusion, and found it unnecessary to reach the remedy issue.

On or about March 1, 1976, one of the co-defendants, Willie Abraham, moved to vacate his sentence upon the ground that a conflict of interest, in fact, existed by virtue of the law firm's representation of other defendants at trial (J.A. 1-29). A similar motion was filed by co-defendant Erroll Holder on March 25, 1976.

By a Notice of Hearing, dated April 15, 1976, the

District Court ordered an evidentiary hearing pursuant to 28 U.S.C. § 2255, "for the limited purpose of taking evidence on the issue of whether the petitioners gave an informed consent to being represented at trial by the law firm of Lenefsky, Gallina, Mass, Berne & Hoffman." (J.A. 51-2).

The hearing was held on May 25, 1976. (H. 1, et seq.). On June 14, 1976, Grant (as well as the co-defendant Robert Hoke), filed similar motions to vacate their sentences (J.A. 90; A. 1, et seq.). Grant's motion was filed, pro se (Id.). He, being incarcerated, did not appear at any hearing, either in person or by counsel. In its Memorandum Order denying all four motions, the District Court explained Grant's non-production, as follows:

> "Since the court finds the evidence produced at the May 25, 1976 hearing is applicable to the issues raised in the Hoke and Grant motions, a new evidentiary hearing will not be ordered and all four motions will be considered together." (J.A.90).

Argument

POINT I

GRANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTION SHOULD BE VACATED.

It is respectfully submitted that the facts revealed at the hearing, upon the instant application for collateral relief, presumptively and actually demonstrate that Grant was denied the effective assistance of counsel

at his trial.

A. The pre-trial conflict of interest proceeding was inadequate.

In United States v. Carrigan, - F. 2d - (2d Cir., November 3, 1976; September Term, 1976, Slip Sheet Ops. at 389), this Court reaffirmed the principle:

> "...that the lack of satisfactory [pre-trial] judicial inquiry [concerning multiple representation of defendants] shifts the burden of proof on the question of prejudice to the government." (Slip Sheet Ops. at p. 393).

Thus, the mere fact of a pre-trial judicial inquiry, and an ostensible waiver of conflict by a defendant, will not avoid the subsequent reversal of a conviction if that inquiry was "insufficient". (Id., at 393; United States v. DeBerry, 487 F. 2d 448, 453-54 [2d Cir., 1973]; United States v. Foster, 469 F. 2d 1, 5 [1st Cir., 1972]).

Moreover, we find no indication that this Court, even in the presence of an adequate inquiry, would nevertheless sustain a conviction if it is actually demonstrated that the defendant was substantially prejudiced by virtue of joint representation.

In United States v. Bernstein, 553 F. 2d 775, 787-789 (2d Cir., 1976), this Court had occasion to review a district judge's refusal to accept repeated efforts by a defendant to waive a potential conflict of interest. There, the defendant's attorney represented only the defendant, but was being compensated, with the approval of the defendant,

by the defendant's employer, who was a co-defendant.

This Court will recall that in Bernstein, the defendant Behar was subjected to lengthy examination, on successive days, by the district judge prior to trial. She persisted in pleading with the judge to permit her to keep the attorney who was then representing her. Not satisfied with her waiver, the district judge directed that she secure new counsel. On appeal, she argued that she had been deprived of the assistance of counsel of her choice. This Court rejected that argument, noting:

> "We have repeatedly held, as have other courts, that representation free from conflicting interests is an essential part of the Sixth Amendment right to the effective assistance of counsel. See Glasser v. United States, 315 U.S. 60 (1942); United States v. DeBerry, 487 F. 2d 448 (2d Cir., 1973); United States ex rel. Hart v. Davenport 478 F. 2d 203, 209-10 (3rd Cir., 1973); United States v. Foster, 469 F. 2d 1, 4-5 (1st Cir., 1972); Lollar v. United States, 376 F. 2d 243 (D.C.Cir., 1967). Choice of counsel should not be unnecessarily obstructed by the court, United States v. Sheiner, 410 F. 2d 337, 342 (2d Cir.), cert den., 396 U.S. 825 (1969), but where there is a serious possibility that a definite conflict of interest will arise, the necessities of sound judicial administration require the court to take command of the situation. United States v. Dardi, 330 F. 2d 316, 335 (2d Cir.), cert den., 379 U.S. 845 (1964).***
>
> "Plainly here there was a probability of conflicting and inconsistent defenses based upon corporate and individual liability . . .*** The freedom of the attorney, whether in cross-examination or assertion of the defense of lack of authority, could have been inhibited and a full and uncompromised defense of his client's interests have been seriously

> impaired***[T]he court had a special duty to make certain that any waiver was knowingly and intelligently made. See United States v. DeBerry, supra, 487 F. 2d at 452-54. But Cf. United States v. Wisniewski, 478 F. 2d 274, 285 (2d Cir., 1973). A waiver in this regard is not quickly or lightly to be found. See Glasser v. United States, supra, 315 U.S. at 70-71."

A trial judge cannot be expected to me omniscient, but for that matter neither can such be expected of a defendant. For that reason, the adequacy of the pretrial inquiry must be gauged within the context of subsequent events, including the trial and the post-trial inquiry brought about by the motion for collateral relief.

A realistic analysis of the problem is contained in Judge Lumbard's recent concurrent opinion in Carrigan, supra,:

> "It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant, the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop.
>
> "It is a rare defendant in a criminal case who fully advises his own counsel of all he knows about the charges against him. Accordingly, most counsel must operate somewhat in the dark and feel their way uncertainly to

an understanding of what their clients may be called upon to meet upon a trial. Consequently, counsel are frequently unable to foresee developments which may require changes in strategy.

"It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may, in cases such as this, require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney." (Slip Sheet Ops. at 398-399).

See also: Concurring opinion of Judge Oakes in United States v. Mari, 526 F. 2d 117, 119 (2d Cir., 1975).

At the pre-trial hearing, only one attorney appeared for the purpose of accounting to the Court as to the propriety of the joint representation. In effect, the Court was accepting the proposition that a law firm was appearing as counsel, despite the fact that law firms are not members of the Bar, as such. The attorney, Gino Gallina, Esq., advised the Court:

"If I may state to your Honor for the record, so that it is very clear, I have been very candid with these defendants. They have all insisted to me that they are not guilty of this charge. They are not just taking a technical position, but they are actually not guilty." (Nov., at p. 5).

In contrast, at the post-trial hearing, Mr.

Gallina testified:

> "***From what discovery we had, which was somewhat limited, we tried to develop trial tactics, but everybody wanted to plead guilty in the case, including Mr. Sisca and including everybody, Mr. Holder, eveybody wanted to plead guilty in the case, and up until the last moment we thought that was what was going to happen, except for Mr. Grant. Mr. Grant was the holdout, and the government said at the last minute, 'If Mr. Grant will not plead also, we won't give pleas to everybody else.
>
> "Until the very last minute, we thought this was not going to go to trial." (H. 136)[Emphasis added].

Mr. Gallina's comments and testimony are significant in several respects. There is little doubt that if the testimony had been included in his comments to the Court at the pre-trial hearing, the Court would certainly have focused more directly upon Grant, and we urge that it would have been an abuse of discretion, indeed a violation of the Sixth Amendment, for the Court to have permitted Grant's continued representation by the law firm.

Additionally, the above quoted testimony of Mr. Gallina sheds substantial light upon the most obvious prejudice which befell Grant. Having geared itself not to go to trial, the law firm was, to say the least, lax in its failure to file the pre-trial motion to suppress based on the lack of minimization.

Mr. Gallina's pre-trial representation to the Court was parallel to that made by another member of the

law firm, Jeffrey M. Hoffman, who represented Grant, as well as Abraham and Logen at the trial. When the defendants were arraigned, the following exchange occurred between District Judge Weinfeld and Mr. Hoffman:

> "Q. Mr. Hoffman, I take it that you have discussed whether or not there is any conflict of interest in your firm's representation of a number of defendants here?
>
> "A. That's correct your Honor. At the present time, having spoken to them, in the posture they are in at the present time, I find no conflict of interest." (J.A. 48).

The above quoted exchange was included in the government's pre-trial motion papers which precipitated the conflict of interest hearing (J.A. 48).*

In retrospect, the pre-trial inquiry was deficient in several additional respects. Thus, it was remarkably free of any indication to Grant as to the alternatives which were available to him. Of course, the defendants were, during the hearing, consistently advised that they could select other counsel of their choice. However, no indication was made to them that, if they were without funds, the Court would appoint an attorney to represent them. Cf.

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*A factor which does not appear to have been considered, either at the pre-trial hearing or thereafter, is the prejudicial impact, upon the jury, which is created by joint representation of multiple defendants. Both in its pre-trial motion papers, and throughout the pre-trial hearing, the prosecutor repeatedly asserted that, by virtue of the anticipated evidence, the trial postures of the different defendants would be disparate (Nov. at pp. 8-11).

Miranda v. Arizona, 384 U.S. 436, 474-5 (1966). If the question of finances had been raised by the Judge, another area would have been opened. As shown at the post-trial hearing, a very large sum of money, perhaps more than a quarter of a million dollars, had been paid to the law firm with respect to its representation of these defendants (H. 8, 18, 34).*

The problem was compounded by the District Court's admonition to the defendants, during the course of the pre-trial hearing:

> "I am going to say this to each of the defendants. I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you, despite what we talked about earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or at any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?" (Nov., at 35-36) [Emphasis added]

Thus, a group of defendants, who were hastily brought to Mr. Gallina's office where they were allegedly lectured on the non-advisability and detrimental potential of securing separate counsel, were then brought to the

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*At the post-trial hearing, Mr. Gallina claimed the Fifth, and several other amendments, when questioned about the funds that were paid (H. 115-116, 125-126, 181-182). He acknowledged, that, with respect to the conflict issue, he did not indicate to the defendants that they could get their money back if they chose to select other counsel (H. 150-153).

District Court, where they were required to make a decision on the spot, which, they were told, would irrevocably bind them. This, amidst the atmosphere of Mr. Gallina holding forth at length to the Court, in the presence of the defendants, concerning the manner in which the government was trying to break up the defense (Nov., at 6, 13-16, 19-22). Must it not be concluded that the District Court's comments, in the minds of the defendants, concretized their relationship with the law firm.

In the absence of evidence to the contrary, it can be assumed that each of the defendants was aware of the fact that a person initially named as a co-conspirator, and thereafter suspected of being an informant, one Coombs, had been executed in typical gangland fashion (H. 15-16, 22-23). Certainly the government was aware of it. However, the record does not show that it was brought to the attention of the District Court during the pre-trial hearing. There can be no doubt that if the District Court were aware of that fact, it would have more carefully assessed the situation. The government must bear responsibility for not speaking up on the matter.

Another item of fact, known to the government, but not revealed to the District Court was the fact that the government intended to offer into evidence certain post-arrest admissions of the defendant Abraham, to wit, that he had purchased heroin worth in excess of $5 million

(R. 1924).* If the government had alerted the Court to that fact, can it be doubted that the Court would have brought home to Grant the prejudicial effect of not only being represented by the same law firm, but also sharing the same attorney (Jeffrey Hoffman) with Abraham?

Finally**, despite the fact that the government repeatedly pressed the Court to require separate counsel for each defendant with respect to the making of the waiver determination, and the further fact that Mr. Gallina fully consented to such a procedure, the Court failed to utilize such a procedure (Nov., at 11-13, 22, 38-43).

In view of the above, we respectfully urge that, as applied to the facts of this case, the pre-trial conflict hearing was inadequate, and Grant should not be deemed to have waived his right to separate, independent, effective assistance of counsel, as guaranteed by the Sixth Amendment.

B. The facts establish that Grant was deprived of the effective assistance of counsel during the period between the pre-trial conflict hearing and the trial.

Despite Mr. Gallina's repeated assertions that joint representation would act to the benefit of the defendants, it is clear that it acted to their detriment. An analysis of his testimony at the post-trial hearing, as

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*The reference is to the trial transcript; see also: the government's brief on the direct appeal (Docket No. 73-2017), at p. 29.

**We respectfully adopt all allegations of prejudice advanced by the briefs in the companion appeals of Abraham, Holder and Hoke.

well as that of John L. Pollok, Eqs., demonstrates that the communication amongst the attorneys was grossly deficient, to the prejudice of Grant.

Two days before trial, Mr. Pollok, in a conference with the defendants, including Grant, was unaware that a conflict of interest hearing had even occurred (H. 90). He was firmly convinced that a conflict of interest actually existed, and that the firm should not represent all of the defendants (H. 79, 80, 83, 90).* Despite the conclusion that a conflict of interest existed, no member of the firm appears to have advised the Court of that fact. Perhaps, if all of the members of the firm had been aware that a conflict of interest hearing had occurred, and had been aware of Mr. Gallina's representations to the Court, that course would have been taken. To a substantial extent, the omission to do so must be traced directly to the trial court's failure to hold each of the members of the firm accountable by requiring the presence of all involved attorneys at the pre-trial hearing.

An even more egregious deprivation of the effective

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*Somewhat incongruously, Mr. Pollok also testified that: "Well, if Mr. Holder had told me or any of the defendants had informed me or particularly if Mr. Holder would have told me that he believed that there was a conflict of interest, I would have refused to represent him."

assistance of counsel, goes directly to the minimization issue. Mr. Pollok testified that, prior to trial, he had actually drawn a set of motion papers directed at such relief. He passed the motion papers on to Gallina, and was later "surprised" that the papers had not been filed (H. 87, 91-92). On the Saturday prior to trial, at a point when it would still have been timely to file the minimization motion, Mr. Pollok, believing that the papers had been filed, so advised the defendants (H. 102-103). His testimony makes that clear:

> "Q. But in your discussion with Mr. Holder and with the other defendants, you did not at all discuss the problem of minimization during that conflict discussion?
>
> "A. I believe we did.
>
> "Q. Did you tell Mr. Holder that a minimization attack had been launched and filed with the court? Did you tell Mr. Holder that on that Saturday?
>
> "A. Probably did. My best recollection is that I did.
>
> "Q. -- is that you did tell that to Mr. Holder?
>
> "A. To the group.
>
> "Q. To the group, and Mr. Holder was in that group?
>
> "A. That's correct." (H. 103).

It is thus clear that the defendant Grant, who was present at the meeting in question, was directly misled into believing that his interests on the minimization issue had been preserved and protected. The interrelationship of

that fact to the conflict problem is clear; however, it presents a separate and independent ground for the vacation of sentence herein.

Incorrect and misleading advice with respect to whether a defendant's rights have been protected can be the basis for a claim for lack of effective assistance of counsel, violative of the Sixth Amendment, and entitling a defendant to collateral relief. United States v. Hayward, 464 F. 2d 756 (D.C.Cir.) on remand (D.C.Dist. Col), 360 F. Supp. 956 (1972); Powers v. United States, 446 F. 2d 22 (5th Cir., 1971); Cook v. United States, 461 F. 2d 530 (5th Cir., 1972).

In view of the above noted testimony, which Grant has had no opportunity to address at the lower court level (See: Point II, infra), this Court should either grant the relief requested or remand the case to the District Court for a further hearing on the issue.*

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*Grant hereby adopts the arguments in the other briefs concerning the tactical reasons that the law firm, or certain members thereof, may have had in failing to file the motion pre-trial, to wit: it would be to one defendant's advantage (Sisca), to refute, by expert testimony, the government's claims that his voice appeared on certain of the tapes. Such testimony could well have had the dramatic affect of offsetting, in the eyes of the jury, other testimony against Sisca.

POINT II

SINCE GRANT, WHO WAS PROCEEDING PRO SE, WAS NOT GRANTED A HEARING AT WHICH HE COULD TESTIFY AND AT WHICH HE COULD CROSS-EXAMINE THE GOVERNMENT'S WITNESSES, HE WAS NOT GRANTED THE HEARING TO WHICH HE WAS ENTITLED UNDER 28 U.S.C. § 2255.

Mr. Grant's petition arrived at the District Court after the evidentiary hearing which had been granted to Abraham and Holder. The District Court declined to give Grant an evidentiary hearing, but rather merely applied to Grant the facts which had been elicited at the hearing which had been accorded to Abraham and Holder. The District Court was clearly in error when it proceeded in that fashion. It perpetuated the problem which has existed in this case from the outset - treating the defendants as a group. Grant's trial attorney was not called to testify, Grant was not given an opportunity to address, by his own testimony, the factual issues raised and revealed at the hearing, and his own particularly situation was not individually assessed.

His petition raises a prima facie ground for relief, or at least the District Court so held in granting a hearing to the other defendants.

18 U.S.C. § 2255 provides:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues

and make findings of fact and conclusions of law with respect thereto.***"

Without Grant's presence at the conflict of interest hearing so that he could testify and cross-examine the other witnesses, it cannot be said that anything was "conclusively" shown as to him.

We respectfully urge, therefore, that, as to Grant, this matter be remanded to the District Court for an evidentiary hearing.

Conclusion

For all of the above reasons, as well as those advanced by the briefs of the other appellants herein, it is respectfully urged that the Order of the District Court denying relief should be reversed, with directions that Grant's judgment of conviction be vacated; in the alternative, the case should be remanded to the District Court for an evidentiary hearing as to Grant.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Walter Grant

New York, New York
November 23, 1976

APPENDIX

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PLAINTIFFS	DEFENDANTS
GRANT WALTER	UNITED STATES OF AMERICA

10/1

(Related action 72 Cr. 1159-Bryan,J.)

CAUSE

28 U.S.C. Sec. 2255 Motion to vacate sentence.

ATTORNEYS

Walter Grant 652 River Avenue Bronx, N.Y. 10451	United States Attorney

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76 Civ 2598	Walter Grant	vs. U.S.A.	76 Civ 25

DATE	NR.	PROCEEDINGS
08-14-76	(1)	Filed petition to proceed in forma pauperis
08-14-76	(2)	Filed pltff's motion to vacate sentence , ret. before Bonsal,J.
09-14-76		Filed Memorandum #45077: Petitioners now move pursuant to 28 U.S.C. 2255 for an order vacating the sentences & granting a new trial the court denies petitioners motions to vacate their sentences & or grant a new trial . So ordered. Bonsal,J. m/n (Filed under No. 76 Civ 0973)
10-01-76	3	Filed pltff Walter Grant's notice of appeal from an order , entered 09-14-76 . copies mailed to U.S. Attorney S.D.N.Y. and Walter Grant .

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

Deputy Clerk

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AC-2-76

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGE BONSAL

WALTER GRANT,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

76 CIV. 2598

72 Cr. 1159

BRYAN

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U.S. DISTRICT COURT
S.D. OF N.Y.

BRIEF IN SUPPORT OF MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28 USC § 2255

STATEMENT OF FACTS

A number of defendants were indicted for various drug offenses. The law firm of Lenefsky, Gallina, Mass, Berne & Hoffman filed notices of appearance on behalf of six co-defendants. Prior to trial, the government informed the trial judge that the evidence would disclose a "chain" conspiracy, common in narcotics cases, and that a possible conflict of interest could arise by having one law firm represent six co-defendants.

The government filed a motion to resolve this apparent conflict of interest, and the trial judge conducted a pre-trial hearing on the matter. At the hearing, Attorney Gallina urged the court to allow his firm to remain as counsel for all co-defendants. In open court, the trial judge asked the defendants individually whether they understood that a possible conflict of interest might arise by having the same firm

represent six co-defendants. Each defendant assured the trial judge that despite any possible conflict, he wished to be represented by the Gallina firm. The judge did not specify how a conflict might arise. Nor did he conduct in camera proceedings or appoint different counsel with whom the defendants could discuss any possible conflict. The court allowed the Gallina firm to remain as counsel for all six co-defendants.

At trial, certain wiretaps were introduced which tended to incriminate five of the co-defendants, but which tended to exonerate the sixth co-defendant, who was the alleged "kingpin" in the conspiracy. At no time before trial did attorneys for any of six co-defendants move to suppress these wiretaps. The five co-defendants, who were implicated by the contents of the wiretaps, were convicted of various narcotics offenses. The sixth co-defendant, Sisca, who did not appear on any of the wiretaps, was acquitted. Walter Grant, one of the five who was convicted, was sentenced to prison for violations of 21 U.S.C.A. § 841 and 21 U.S.C.A. § 843. Following the trial, counsel for the co-defendants moved to suppress the wiretap evidence. The court would not entertain these motions on the ground that they should have been filed prior to trial.

The Defendant Grant now moves to vacate sentence pursuant to 22 U.S.C.A. § 2255 on the basis that his Sixth Amendment rights were abridged.

ARGUMENT

THE DEFENDANT GRANT WAS DENIED HIS SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The question of when a convicted defendant has been denied his Sixth Amendment rights, resulting from a conflict of interest of trial counsel, has been the subject of much recent treatment in the Second Circuit Court of Appeals. The starting point for a discussion of this issue is the case of Morgan v. United States, 396 F.2d 110 (2d Cir. 1968). In Morgan, the defendants were convicted of violating the Mann Act. Prior to trial, counsel for the defendant, Morgan, withdrew from the case, and the trial judge appointed the attorney for Stein, Morgan's co-defendant, to represent Morgan. A conflict arose between the positions of Stein and Morgan, and Stein was not cross-examined on Morgan's behalf.

Morgan asked that his sentence be vacated, and filed a § 2255 proceeding, alleging denial of Sixth Amendment rights. In remanding the proceedings, the court stated:

> Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented.

396 F.2d at 114. Accordingly, the court suggested that, where a potential conflict of interest might arise from a joint representation situation, the trial court should determine, through "careful inquiry," whether prejudice will result from the joint representation. The court felt that the trial judge was in the position to make inquiry, "both public and private," as may be necessary to determine if a conflict would arise.

Subsequently, in United States v. Lovano, 420 F.2d 769 (2d Cir. 1970), cert. denied, 397 U.S. 1071 (1970), the court further specified what would be required for a reversal of conviction on Sixth Amendment grounds resulting from a conflict of interest. The court set forth the Second Circuit rule:

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.

420 F.2d at 773. See also United States V. Badalamente, 507 F.2d 12 (2d Cir. 1974), cert. denied, 95 S. Ct. 1565 (1975).

Thus, the rule in the Second Circuit is that some specific showing of prejudice must be shown to overturn a conviction on the conflict of interest ground. The Lavano rule has remained viable in the Second Circuit, and most of the recent litigation on the conflict issue has been concerned with the sufficiency of the pretrial inquiry by the trial judge, in relation to the Lovano standard.

Here, the defendant, Grant, has suffered a specific prejudice through the failure of his counsel to move that incriminating wiretap evidence be suppressed. The question then arises as to whether the pretrial inquiry was effective so as to alert Grant of the possibility of this prejudice, thereby casting serious doubt on his post-trial claim.

Even before the Lovano standard of "specific prejudice" was enunciated, the court had made inquiry into the issue of the sufficiency of the pretrial hearing. In United

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States v. Sheiner, 410 F.2d 337 (2d Cir. 1969), cert. denied, 396 U.S. 825 (1969), cert. denied sub nom., United States v. Piacentile, 396 U.S. 859 (1969), rehearing denied, 412 U.S. 944 (1973), the defendant were convicted of mail fraud and conspiracy offenses relating to the fraudulent sale of altered pennies. On the second day of trial, the trial judge informed the two defendants who were represented by the same counsel that the government's evidence tended to show that the Defendant Sheiner was the "outlet" for coins provided by the defendant, Piacentile. The court noted that this might present a conflict and asked the defendants to consider whether they wished to continue being represented by the same counsel. On the next day, after the Defendant Sheiner had conferred with another attorney, he informed the trial judge that he did not wish to change his attorney.

After Sheiner was convicted, he appealed on Sixth Amendment grounds. The court, citing Glasser v. United States, 315 U.S. 60 (1942), noted the importance of representation free from conflicting interests. As to the Defendant Sheiner, however, the Court remarked:

> We think that the evidence in this case shows that Sheiner was clearly informed of the possibility of prejudice from sharing Piacentile's counsel but that he freely made a considered choice to continue Mr. Siegal's joint representation. The court was scrupulous in alerting Sheiner and his counsel to the danger of conflicting interests and in specifically ascertaining that Sheiner had discussed the question with counsel, considered it and decided to proceed with Siegal.

410 F.2d at 342.

The record in the present case reveals that the trial judge, relying on Sheiner, insisted that the pretrial hearing was sufficient to dispose of the conflict of interest issue. Upon closer examination, however, it is clear that Sheiner is distinguishable on at least two bases. First, unlike the defendant here, Sheiner was advised by the trial judge as to how his position would conflict with that of his co-defendant. Secondly, Sheiner had the opportunity to consult with outside counsel on the conflict matter.

The court had the opportunity to expand on the sufficiency of hearing issue in United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973). In rejecting the defendant's Sixth Amendment claim, the court commented upon the proper course for the trial judge to take when a potential conflict of interest becomes apparent:

> In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. Such a procedure by the district court would reduce the possibility that this court would feel obliged to reverse a conviction and order a new trial because defendant's counsel was inhibited by a conflict of interest.

470 F.2d at 881-82. (emphasis added).

The holding in Alberti seems to venture further than Sheiner on the issue of the importance of the defendant's understanding of the nature of the conflict. A procedure such as that employed in the present case, which does not purport to instruct the defendants as to the manner in which the conflict might arise, is clearly insufficient in light of Alberti. The trial judge made no effort to determine if the defendants were fully advised of the facts underlying the conflict.

In United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973), the court again stressed the importance of alerting the defendants as to the facts underlying the conflict:

> We are not here dealing with negligence on the part of the trial judge or defense counsel in failing to inquire into the possibility of a conflict of interest. On the contrary, from the very outset both the court and government evidenced a keen sensitivity to the subject and repeatedly sought to ferret out from the defendants and their retained common counsel whether there were facts or separate defenses indicating the necessity for separate representation.

478 F.2d at 281.

While the procedure employed by the trial court in Wisniewski was quite similar to that of the instant case, the obvious difference between the cases is, again, the inquiry as to whether the defendants were aware of the facts. While the trial judge here explained a conflict of interest in general terms and inquired whether Mr. Grant's choice was made freely, not the slightest effort was made to determine if the defendant, Grant, understood factually how a conflict might arise.

Following Wisniewski, in United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973), the court adopted a significant new rule in Sixth Amendment conflict of interest cases. In DeBerry, two defendants, convicted of drug offenses, who were represented by the same attorney appealed on the Sixth Amendment conflict ground. The court pointed out that, although counsel for the co-defendants assured the trial judge that he had explained the conflict issue to the defendants, this was an insufficient inquiry. The court, citing United States v. Foster, 469 F.2d 1 (1st Cir. 1972), adopted the rule that, where the inquiry of the trial judge is insufficient, the burden on the question of prejudice is shifted to the government. 487 F.2d at 453, n. 6.

While the trial court in DeBerry apparently did not question the defendants at all, relying instead on the counsel's assurance, the fact that the trial judge did question the defendants here should not remove this case from the DeBerry rule. The effect of an inadequate inquiry is the same as that resulting from no inquiry at all. Hence, the teaching of DeBerry is that the government here has the burden of proof of showing that no prejudice resulted to the Defendant Grant from the joint representation by the Gallina firm.

The progression of Sixth Amendment conflict cases in the Second Circuit, which are relevant here, ends with United States v. Vowteras, 500 F.2d 1210 (2d Cir. 1974), cert. denied, 419 U.S. 1069 (1975). In the Vowteras case, the court clarified its position as to the role of the pretrial hearing. It will be recalled that in Alberti, supra, the court indicated that the pretrial hearing would serve to reduce the possibility of the convictions being reversed on appeal. The mere fact that a pretrial hearing is held on the

conflict issue will not necessarily be conclusive on the Sixth Amendment issue. Similarly, in Vowteras, the court stated that, since the defendants were fully advised of the underlying facts of the potential conflict, they could not, on appeal, repudiate their choice of counsel, absent specific showing of prejudice. The clear import of Alberti and Vowteras is that, even where the defendants are fully advised, a specific showing of prejudice can defeat the conviction. It seems, then, that the role of the pretrial hearing is simply to mitigate the possibility of resulting prejudice. If prejudice is shown, a conviction may be reversed, notwithstanding a sufficient pretrial hearing.

An overview of the Second Circuit cases results in the formulation of certain rules which pertain to Sixth Amendment conflict cases. First, the defendant must point to a specific prejudicial occurrence in order to prevail on appeal. A sufficient pretrial hearing during which the defendant is fully advised of the facts underlying the potential conflict will bear heavily against a bona fide showing of prejudice. If a pretrial hearing which amounts only to an insufficient inquiry is afforded, the burden of showing no prejudice will be on the government.

Turning to the present case, then, the first hurdle which confronts the defendant is to point to a specific instance of prejudice resulting from the joint representation of the Gallina firm. Such a showing of prejudice is apparent from the record. The Gallina firm neglected to file motions to suppress the wiretaps until after the trial had concluded. The circumstances of this case lead to no other conclusion, but that the failure to make these motions was for the sole reason that the wiretap evidence did not implicate Sisca, the alleged

leader of the conspiracy. Thus, this prejudice was the direct result of joint representation which abridged Sixth Amendment rights.

In Wisniewski, supra, the Second Circuit Court indicated that post-trial claims of conflict of interest must be viewed with some suspicion:

> Absent objective proof we cannot assume that a lawyer representing more than one client would act in violation of the Code of Professional Responsibility, much less ignore the opportunity to introduce proof which might acquit one defendant but not the other.

478 F.2d at 285.

This "objective proof," however, is present in the case at bar. The motion to suppress is considered a fundamental defense tactic in cases where wiretap evidence is employed to incriminate a defendant. This is not a mere case of objecting, in hindsight, to ineffective defense tactics. See United States v. Sheiner, supra.

The case of United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973), tends to support the defendant's allegation of prejudice resulting from the failure to file pretrial motions. In Hart, six co-defendants who were charged with various gambling offenses were represented by the same attorney at trial. The evidence showed that the appellant Hart was employed as a bartender in an establishment owned by Mr. and Mrs. Battersby. A search of the premises resulted in the seizing of evidence which tended to implicate Hart. Although the affidavit underlying the warrant which authorized the search was characterized by the Third Circuit Court as "palpably insufficient," counsel for the co-defendants made no pretrial motions for suppression of the evidence.

After Hart was convicted, he appealed on the basis of ineffective assistance of counsel. Upholding his claim, the court noted that, had an effort been made to separate Hart from the seized evidence, another defendant would have been further implicated:

> Here, again, the predicament of counsel becomes clear, for any effort to negate Hart's connection with Exhibits S-9 and S-10 would have the inevitable tendency to focus attention on Battersby's role as a proprietor of a gambling enterprise as well as a bar and grill.

478 F.2d at 208.

The conflict between Grant and Sisca in the present case seems, if anything, more aggravated than the conflict in Hart. Here, had a successful suppression motion been made, Sisca's case would have been weakened, in that the jury would not have been aware of the conspicuous absence of his voice in the wiretap evidence. This crucial evidence, if suppressed, would have, in effect, weakened Sisca's position in the eyes of the jury and would have strengthened immeasurably the stance of Grant and the other co-defendants. Accordingly, effective representation by the Gallina firm of both Sisca and the other defendants was not possible, and Grant's Sixth Amendment rights were abridged. The failure to ask that the wiretap evidence be suppressed is a specific showing of prejudice as required by Lovano.

The remaining question is whether the pretrial inquiry was sufficient to afford the defendants full understanding of the potential conflict, so that they may not now object to the joint representation. As heretofore noted, the trial judge did not inquire as to whether the defendants were aware of

the facts underlying the potential conflict. Thus, a breach occurred in the protection afforded by Alberti, and the inquiry became insufficient as a matter of law. Although in camera proceedings were suggested at the pretrial hearing, the judge did not feel that such proceedings were necessary. Compare United States v. Vowteras, supra. Finally, the judge did not see to it that the defendants had guidance from independent counsel on the conflict issue. Compare United States v. Sheiner, supra; United States v. Liddy, 348 F. Supp. 198 (D.D.C. 1972).

CONCLUSION

It is clear, that the Defendant Grant has suffered a specific prejudice resulting from the joint representation. The burden lies on the government to show otherwise. The pretrial inquiry which attempted to alert Grant to the potential conflict of interest was insufficient to accomplish its purpose. Mr. Grant is entitled to have his sentence vacated and either to be released from custody, or to be granted a new trial.

Respectfully submitted,

Walter W. Grant Jr.

Walter W. Grant
653 River Avenue

Bronx, New York
10451

Sworn to before me the 1st day of April, 1976

MONROE MESSINGER
NOTARY PUBLIC STATE OF NEW YORK
NO. 14-2674475
QUALIFIED IN ROCKLAND COUNTY
COMMISSION EXPIRES MARCH 30, 19 78

A 15

GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO :Judge BONSAL

DATE: 6/17/76

Re: 76 Civ 2598

FROM :Frances Salten
Pro Se Clerk

SUBJECT:Assignment of petition for collateral relief, 28 USC 2255 -Rule 9(A)

The attached petition being in proper form, and the petition to proceed in forma pauperis having been granted by the Part I Judge, the Pro Se Office is submitting the application to your Honor as the judge who accepted the plea or sentenced the defendant.

Your Honor may either act on the application without responsive papers or advise the U.S. Attorney of the date when answering or reply papers are due.

All further proceedings with respect to the application, including applications for extensions of time, will be submitted directly to your Honor.

May we respectfully request that the Law Clerk to the Judge notify the Pro Se Office upon receipt of any responsive pleadings.

By: J.BLUM
Deputy Pro Se Clerk

A 16

5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 CIV. 2598

WALTER GRANT,
Petitioner

-v-

UNITED STATES OF AMERICA
Respondent

DOCKET NO.

NOTICE OF REFERRAL

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JUN 14 9 25 AM '76

Pursuant to Title 28 U. S. C. § 2255, the above-entitled action is referred to

JUDGE BONSAL

All papers to be filed in this action are to be filed in the Clerk's Office, with the exception of motions, which will be presented directly to the Pro Se Clerk in Room 615.

All documents filed in this action in future, are to have the referred Judge's initials after the docket number, as designated above.

By Order of the Court:

Dated: New York, N. Y.
JUN 14 1976

RAYMOND F. BURGHARDT
Clerk

By: M. Harbison
Deputy Clerk

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

JN 3~~1~~ 1976

76 CIV. 2598

TO : Judge ~~Bryan~~ Bonsal

DATE: ~~6/3/76~~ 6/9/76

JUDGE BONSAL

FROM : Frances Salten
Pro Se Clerk

SUBJECT: Grant v. U.S.A., 72 Cr 1159

Please advise if you want us to assign attached motion to vacate sentence, from Hoke's co-defendant, to your Honor. 6/9

Yes/SR

Respectfully submitted

Frances Salten

See Willie Abraham & Ismael Valdez

5010-109

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

WALTER GRANT, : Docket No. 76-2150

Petitioner-Appellant, : CERTIFICATE OF SERVICE

-vs.- :

UNITED STATES OF AMERICA, :

Respondent. :

----------x

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court, hereby certifies that on November 23, 1976 he served three (3) copies of the Brief and Appendix in behalf of Appellant Walter Grant upon the United States Attorney for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York 10007, by depositing same in a post-paid, properly addressed wrapper in an official depository of the United States Postal Service, within the State of New York.

HENRY J. BOITEL

New York, New York
November 23, 1976